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No. 668

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In The Supreme Court of The United States

KELLY CHAMBERS,

Petitioner

vs.

STATE OF ALASKA,

Respondent

PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The Opinion of the Supreme Court of Alaska filed August 10, 1964, is as yet unreported; however, it is appended herein as Appendix "A".

JURISDICTION

The judgment of the Superior Court of Alaska, Fourth Judicial District, was entered on August 1, 1963. Judgment was appealed and the Supreme Court of Alaska rendered its Opinion August 10, 1964.

A petition for rehearing was denied on September 4, 1964. The mandate was spread on the record of the Superior Court, Fourth Judicial District, Fairbanks, Alaska, on September 10, 1964. This Petition for Writ of Certiorari was filed within the ninety (90) days allowed under Rule 22 of the Supreme Court Rules. Jurisdiction of this Court is invoked under 28 USCA, Sec. 1257 (2).

QUESTIONS PRESENTED

1. Whether the Petitioner was not denied due process of law in violation of the 14th Amendment of the U. S. Constitution in that he was convicted under a multiple count indictment which lacked the descriptive averments necessary

   (a) to set forth a State crime;

   (b) to give the Petitioner sufficient notice as to the particular wrongful acts with which he was charged; or

Counts II, V, XII and XV of the indictment charge the Petitioner with uttering and publishing deeds, but did not give any recording references or describe the property that the deeds supposedly involved.

Counts IV, XIII and XVI of the indictment charge the Petitioner with having unlawfully and feloniously offered and having caused deeds to be recorded at the Recorder's Office in Fairbanks, Alaska. No recording references were given or property descriptions that the deeds supposedly involved.

2. Whether the Petitioner has not been denied due process of law and placed in double jeopardy under the 14th and 5th Amendment respectively of the U. S. Constitution by reason of his having been found guilty of Counts II, XII and XV charging him with uttering and publishing deeds and of his having been found guilty of Counts IV, XIII and XVI charging him with having allegedly unlawfully and feloniously offering and having recorded three of the same deeds.

Both sets of these Counts involved the very identical acts and proof and a conviction of one bars a like conviction or prosecution of the other.

3. Whether the Petitioner has not been denied equal protection of the law and due process under the 14th Amendment of the Federal Constitution by reason of the State District Attorney and the Grand Jury having an unguided and untrammeled discretion in determining whether or not the Petitioner would be charged with either

(a) a crime carrying a penalty of twenty (20) years, or, alternatively;

(b) a crime carrying a penalty of two (2) years,

(c) or both.

The Petitioner could have been charged with either a violation of 11.25.010 or of 11.30.270, and there are no standards to determine in which instance he should be charged with one or the other of the two statutes. In this case and as a matter of fact, he was charged with violation of both statutes.

4. Whether the Petitioner was not denied due process of law in violation of the 14th Amendment of the U. S. Constitution in that he was convicted on four counts (of a multiple count indictment) which did not charge a crime under the State Statute he was charged with having violated.

Petitioner was charged in Counts II, V, XII and XV of the indictment with having uttered and published insufficiently described "deeds" under a State Statute (Alaska Statutes 11.25.010), which by a reasonable and proper construction or interpretation does not include "deeds".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

As set forth in Appendix "B" hereto, the Constitutional and Statutory provisions are the 5th and 14th Amendment of the United States Constitution and Alaska Statutes 11.25.010 and 11.30.270.

STATEMENT OF FACT

The Petitioner, Kelly Chambers, was indicted by the State of Alaska on a multiple count indictment, the pertinent counts of which are set forth in Appendix "C". The jury found him guilty of Counts II, IV, V, XII, XIII, XV and XVI.

Counts II, V, XII and XV charged under AS 11.25.010 that the Petitioner *did utter and publish* the following deeds:

Grouping One

Count II: Deed dated March 2, 1962 from Elizabeth Walker to Thomas Radovitch.

Count V: Deed dated December 26, 1961 from Albert Norlin to Kelly Chambers.

Count XII: Deed dated March 2, 1962 from Elizabeth Walker to Kelly Chambers.

Count XV: Deed of Trust dated March 2, 1962 between Thomas and Anna Radovitch and the Far North Baptist Assoc. and Kelly Chambers, as Trustee.

Counts IV, XIII and XVI charged under AS 11.30.270 that the Petitioner, Kelly Chambers, unlawfully and feloniously *offered and had recorded* at the Recorder's Office the following three deeds:

Grouping Two

Count VI: Deed dated March 2, 1962 from Elizabeth Walker to Thomas Radovitch.

Count XIII: Deed dated March 2, 1962 from Elizabeth Walker to Kelly Chambers.

Count XVI: Deed of Trust dated March 2, 1962 between Thomas and Anna Radovitch and the Far North Baptist Assoc. and Kelly Chambers, as trustee.

No recording references or property descriptions were set forth in any of the Counts listed above. During the course of the proceedings there were numerous other deeds referred to and it was impossible for the Petitioner to determine beforehand exactly what he was to be confronted with during the trial. The Petitioner moved shortly after the indictment was issued that it be dismissed because of the failure to include proper descriptions and references.

The State's proof and argument for Counts II, XII and XV consisted of the same evidence and involved the same identical acts that constituted the alleged crimes under Counts IV, XIII and XVI. The State's position was clearly expressed in the District Attorney's argument to the jury when he stated:

> "In this state and in many other jurisdictions there is a law against uttering and publishing a forged instrument, and particularly there is another law against recording or filing a forged instrument. And if the same particular act happens to constitute both, you'd be in the same position, perfectly legal, as when you for instance, steal Government property where you're committing . . . Federal Government property, you're committing an act against the Federal Government, and if you're in the State where the State has the criminal jurisdiction, you're also committing the crime of larceny against the State, and both would be triable on separate situations and both would be violations of the law." (TR 852-853).

It was also Petitioner's contention before the State Supreme Court that when employing AS 11.25.010 the conviction carries with it punishment by imprisonment in the penitentiary for not less than two, or more than twenty years; whereas, a conviction under AS 11.30.270 carries with it punishment by imprisonment in the penitentiary for not more than two years, or by a fine of not more than $2,000.00 or by both. Under the circumstances at hand, and as the proof and evidence developed it was apparent that the District Attorney in his discretion presented, and the Grand Jury indiscriminately determined that a charge was to be levied—not under *either* AS 11.25.010 or AS 11.30.270—but under *both* statutes.

Upon being found guilty under the Counts noted above, Petitioner was sentenced to five years under Counts II, V, XII and XV (the sentence to run concurrently) and he received fines of $500.00 each under Counts IV, XIII and XVI.

Petitioner must be candid with the Court and State that with the exception of the argument that he would be subject to double jeopardy, the other contentions under the U. S. Constitution submitted herein were not directly raised and were either only obliquely raised or were not raised in the exact manner presented herein; however, it is Petitioner's contention that once jurisdiction attachs, the Supreme Court is permitted to examine the entire record and the recognized Constitutional questions can thereafter be ruled upon by this Court.

In the event the Supreme Court feels bound by previous precedence to the effect that an argument on one Constitutional grounds in the State Court does not permit other Constitutional arguments to be made in the Supreme Court, it is submitted that this case rule should be re-examined.

Finally, and in any event, this Court is asked to rule upon the Petitioner's principle contention that he was subject to double jeopardy for the same crime. This case affords the Supreme Court the opportunity to further make it apparent that other portions of the Bill of Rights of the U. S. Constitution will be invoked against the States through the 14th Amendment, and more particularly, that prohibition against placing a defendant (Petitioner) in double jeopardy

under the 5th Amendment. cf *Kohlfuss v. Warden of Conn. State Prison* (1962) 183 A2d 626, 149 Conn. 692, Cert. den. 83 S. Ct. 298, 371 U.S. 928, 9 L. Ed. 2d 235.

ARGUMENT I

THE PETITIONER WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE 14TH AMENDMENT OF THE U. S. CONSTITUTION IN THAT HE WAS CONVICTED OF A MULTIPLE COUNT INDICTMENT WHICH LACKED THE DESCRIPTIVE AVERMENTS NECESSARY TO SET FORTH ANY STATE CRIMES.

Petitioner repeatedly argued that the indictment was insufficient because, among other things, it was in want of necessary descriptive averments, particularly with reference to the need of reflecting property descriptions, or some more specific identity of the particular "deeds" involved. (TR 598). The importance of having this information to ward off future indictments involving the same transaction and to otherwise prepare for the trial became more evident during the course of the trial. The complaining witnesses all claimed ownership to more than one parcel of property in and around the Fairbanks area; numerous property instruments were introduced allegedly involving the same parties and the Petitioner, and in some instances, dates thereon were identical,with those in the several counts.

Rule 7 (c) of the Alaska Rules of Civil Procedure, almost identical to Rule 7 (c) of the F.R.C.P. requires that an indictment be set forth in a plain, concise and definite written statement of the essential facts constituting the offense. This does not eliminate the need of fully informing the

Petitioner of the charge placed against him so that he may not only prepare his defense thereto, but also meet any further like accusations with a plea of double jeopardy.

No case has been uncovered directly in point; however, cases and authorities which significantly ruled on indictments involving real property or formal documents include:

1. *Raybourn v. State* (Okla. 1958) 339 P2d 539, involving an alleged forged security instrument release, wherein it was held in the course of the proceedings that the failure to recite, in the indictments, the book and page in the Recorder's Office where the forged instrument has allegedly been filed, or to otherwise identify the property with clarity was insufficient.
2. *State v. Fromm* (N.J., 1960) 166 A2d 832, which held the charging defendant with having falsified certain municipal "documents" without further identifying the "documents" other than to denote they belonged to the Municipal Court, was insufficient.
3. 42 C.J.S. *Indictments and Informations,* Sec. 143, page 1052, cites the rule to be that "property which is the subject of the offenses charged must be discribed in the indictment * * *." Also see 27 Am. Jur. *Indictments and Informations,* Sec. 83, page 644.

The suggestion of the State that criminal discovery by way of a Bill of Particulars could have resulted in the conveyance of such information, violates the basic rule of law that essentials missing from an indictment may not be sup-

plied by a Bill of Particulars or other discovery processes. cf *State of New Jersey v. Fromm*, (N. J., 1960) 166 A2d 832.

ARGUMENT II

THE PETITIONER HAS BEEN PLACED IN DOUBLE JEOPARDY BY REASON OF HIS HAVING BEEN FOUND GUILTY OF ONE GROUP OF COUNTS CHARGING HIM WITH UTTERING AND PUBLISHING DEEDS, AND WITH A SECOND GROUP OF COUNTS CHARGING HIM WITH HAVING UNLAWFULLY AND FELONIOUSLY OFFERED AND HAVING RECORDED THE SAME DEEDS.

Counts IV, XIII and XVI are repetitions of Counts II, XII and XV. The State's proof and argument throughout was that the very same identical acts constituted both crimes.

The issue of double jeopardy was raised in the State courts, and particular reliance was placed by the Petitioner on the case of *Blockburger v. U. S.* (1932) 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306. There the Court held that Sec. 1 of the Federal Narcotics Act, forbidding the sale of drugs except in or from the original stamped package, and Sec. 2, forbidding the same act not in pursuance to a written order, created two distinct offenses, and both could be committed in the course of a single act or transaction. The Court stated at page 304 of 284 U.S., at page 182 of 52 S. Ct. that:

> "The applicable rule is that, where the same act or transaction constitutes the violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of a fact which the other does not. (Citing authorities).

By the State's own admission made during the course of its argument (supra, page 5) in this instance the proof,

under both statutes, is identical, and no proof of a fact was offered for one act which was not required for the other.

In its Opinion the Supreme Court of the State of Alaska attempted to bring the immediate case within the rule of the *Blockburger* holdings by stating that under Section 11.30.270, it could be reasoned that proof of an *additional* fact had occurred, to-wit: The Petitioner had "offered forged deeds for recording." See Appendix (1), page 6. In other words, the Supreme Court of Alaska seemed to contend that an *additional* fact had occurred by the offer alone, and it was all that was necessary to prove a conviction under that section of the law which, incidentally, carries with it the *lesser* punishment. In fact, and assuming arguendo the State's contention, had the Petitioner not offered the forged deeds as alleged for recording under the several charges of uttering and publishing, there would have been no violation of Section 11.25.010. Furthermore, the indictment charged, under AS 11.30.270, that the Petitioner "did willfully, unlawfully and feloniously offer *and* have recorded at the Recorder's Office" several deeds; not that the defendant "offered forged deeds for recording".

The Supreme Court commented that "it would have been sufficient for the State to have shown that (Petitioner) had presented the instruments to a Clerk in the Recorder's Office representing they were true instruments without a request that they be recorded" and that "this would have proved the crime of uttering and publishing," although "it would not have been sufficient to prove the crime of knowingly procuring or offering a forged instrument to be filed

or recorded." What might have been done is a far cry from what, in fact, was the offered evidence and what in fact was the argument made to the jury. There can be little question but that the jury was prevailed upon to believe and consider that the same evidence and identical facts constituted two different crimes under two separate statutes.

The end result is inescapable that Petitioner was placed in double jeopardy and twice convicted for the same crime.

If certiorari is granted it will be contended that the 5th Amendment to the U.S. Constitution, and more particularly that provision relating to double jeopardy applies only to Federal jurisdictions and is not binding on the States.

It is Petitioner's argument that the double jeopardy provision of the 5th Amendment applies to State proceedings in that it amounts to a denial of due process under the 14th Amendment. Compare *Kohlfuss v. Warden of Conn. State Prison* (1962) 183 A2d 626, 149 Conn. 692, Cert. den. 83 S. Ct. 298, 371 U.S. 928, 9 L. Ed. 2d 235.

The 14th Amendment makes the 1st Amendment applicable to the States. *New York Times Co. v. Sullivan*, (1964) 84 S. Ct. 710, 376 U.S. 354, 11 L. Ed. 2d 686, and by the same reasoning processes, the 5th Amendment relating to double jeopardy is also applicable to the States.

ARGUMENT III

THE PETITIONER HAS BEEN DENIED EQUAL PROTECTION OF THE LAW AND DUE PROCESS UNDER THE FEDERAL CONSTITUTION BY REASON OF THE STATE THROUGH THE DISTRICT ATTORNEY AND THE GRAND JURY HAVING AN UNGUIDED AND UNTRAMMELED DISCRETION IN DETERMINING WHETHER OR NOT THE PETITIONER WAS TO BE CHARGED WITH EITHER A CRIME CARRYING A PENALTY OF 20 YEARS, OR ALTERNATIVELY, A CRIME CARRYING A PENALTY OF 2 YEARS, OR BOTH.

The concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to governmental action questioned or challenged. *Reynolds v. Sims* (1964), 84 S. Ct. 1362, ... U.S. ... L. Ed. 2d ...

The equal protection clause of the 14th Amendment is applicable when State action is involved. State action is involved herein because through a State agency a law has been passed which is vague and uncertain, and through the State's criminal processes it is being employed in a way which results in a discrimination between person who it is claimed committed identical acts. State action of this kind falls within the proscription of the Equal Protection clause of the 14th Amendment. cf *Robinson v. State of Florida* (1964), 84 S. Ct. 1693, 1695, ... U.S. ...; ... L. Ed. 2d ...; *Peterson v. City of Greenville* (1963), 83 S. Ct. 1119, 373 U.S. 244, 10 L. Ed. 2d 323.

As noted above, there are two crimes that have been charged under the very same acts complained of. Thus, the District Attorney or the Grand Jury have the absolute discretion to determine whether a defendant—such as Petioner—will be charged under one act or the other, or both. The consequences vary considerably, with a maximum sen-

tence of twenty years under Section 11.25.010, two years under Section 11.30.270, and a total of twenty-two years under both.

In *State of Oregon vs. Pirkey* (Ore. 1955) 281 P2d 698, the defendant was charged with drawing a bank check with insufficient funds in the bank with which to pay the check in full. The trial court dismissed the indictment stating that a statute delegating to the Grand Jury or the magistrate the power to determine in advance whether a defendant should be charged with a felony or a misdemeanor for issuing a check with insufficient funds in the bank with which to pay the check and fixing no standards to guide them, violated the equal protection clause of the State and Federal Constitutions and an indictment drawn pursuant to that statute was dismissed. On appeal the lower court's action was sustained.

> "The constitution does not require that law shall affect all persons exactly alike, but there is a guarantee of like treatment to all persons similarly situated. It is not the purpose of either constitutional provision to take from the States the right and power to classify the subjects of legislation. It is only when such attempted classification is arbitrary and unreasonable that the court can declare it to be beyond the legislative authority. * * * The Constitution does imply that if by statute the conduct of one person or group produces a certain legal consequence while the conduct of another person or group produces a different legal consequence, there must be some rational distinction between the persons or groups of persons in question sufficient to warrant the application to them of defferend legal consequences for their acts. * * * " P. 702.
>
> " * * * We hold that the provision of the statute which purports to vest in a Grand Jury or magistrate the unguided and untrammeled discretion to determine whe-

ther a defendant shall be charged with a felony or a misdemeanor is unconstitutional * * * " P. 708.

It should be equally unconstitutional when the office of the District Attorney or the Grand Jury may have the "unguided and untrammeled discretion" to determine whether a defendant shall be charged with a crime carrying a penalty of twenty or two years or both, and that in this instance this is the very discretion that has been vested in the District Attorney's office and the Grand Jury.

ARGUMENT IV

PETITIONER WAS DENIED DUE PROCESS OF LAW IN VIOLATION OF THE U. S. CONSTITUTION IN THAT HE WAS CONVICTED ON FOUR COUNTS OF A MULTIPLE COUNT INDICTMENT UNDER A STATUTE WHICH DID NOT CHARGE A CRIME UNDER THE STATE STATUTES HE ALLEGEDLY VIOLATED.

A governmental purpose to control or pervent activities, constitutionally subject to state regulations may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. See *Aptheker v. Secretary of State*, 84 S. Ct. 1659, 1664 (1964), 12 L. Ed. 2d 992, ... U.S. .....; *N.A.A.C.P. v. Alabama* (1964), 84 S. Ct. 1302, 337 U.S. ....., 1314, ... L. Ed. 2d. .....

The two Alaska statutes involved, both by their plain import, and by their attempted application sweep "too widely and too indiscriminately across the liberty guaranteed under the Federal Constitution." *Aptheker v. Secretary of State*, supra, page 1668.

A law forbidding or requiring conduct in terms so vague that men of common intelligence must necessarily guess at

its meaning and differ as to its application violates due process. *Baggett v. Bullett*, 84 S. Ct. 1316, ... L. Ed. 2d. ..... ; ..... U.S.....

Where a case involves a personal liberty protected by the Bill of Rights the proper approach to legislation curtailing any such liberties is that adopted by the U.S. Supreme Court in *N.A.A.C.P. v. Britton* (1962), 83 S. Ct. 328, 371 U. S. 415, 9 L. Ed. 2d 405, and *Thornhill v. Alabama*, 60 S. Ct. 736, 310 U. S. 88, 84 L. Ed. 1093. In *N.A.A.C.P. v. Britton*, this Court stated:

> "(I)n appraising a statute's inhibitory effect upon such rights, this Court has not hesitated to take into account possible applications of the statute, in other factual contexts besides that at bar * * *. The objectionable quality of vagueness and over-breadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute, susceptible of sweeping and improper application * * *. These freedoms are delicate and vulnerable as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." 371 U.S. at 432, 433, 83 S. Ct. at 337.

Here the sting of the sanction has been applied under a vague, loose and improper application of the Alaska statute.

As noted heretofore, the immediate charges were leveled against the Petitioner under AS 11.25.010 and AS 11.30.270. Both these Sections are set forth in Appendix "B".

Sec. 11.25.010 has been viewed as designating two of-

fenses, i.e., that of forgery and that of uttering, which are separate and distinct. *Ing v. United States,* (Alaska, 1960) 9 CCA, 278 F. 2d 362.

However, whereas under Sec. 11.25.010 it is a crime to *forge* "(1) a public record, certificate, return * * * a contract, charter, letters, patent, *deed,* lease, bill of sale, will, testament, bond writing obligatory, undertaking, letters of attorney, policy of insurance, bill of lading, (etc)", it is only a crime to "(2) intentionally *utter(s) or publish(es)* as true and genuine a false, altered, forged, counterfeited, falsely printed, or photographed, record, writing, instrument or other matter * * *".

It is Petitioner's position that when the Legislature enumerated what series of documents may (1) not be forged and (2) may not be uttered and published; that the inclusion of "deeds" under the former, but *not* under the latter division of the Section, clearly implies it was the lawmaker's intent that "deeds" not be within the uttering and publishing prohibition. Perhaps this is because the usual manner of uttering and publishing a deed is by recordation and this is made a crime under AS 11.30.270.

Petitioner's argument is, to some extent, merely an application of the maxim "expressio unius est exclusio alterius" or "the expression of one thing is the exclusion of another." *Black's Law Dictionary,* Fourth Edition, page 692. The forces of the maxim is strengthened by contrast where a thing is provided in one part of the statute and omitted in another. *U. S. v. Wiltberger* (1820), 5 Wheat. (18 U.S.) 76, 5 L. Ed. 37. Chief Justic Marshall in *Marbury v. Madison,*

1 Cranch (1893) (5 U.S.) 137, 174, 175, 2 L. Ed. 60 said, "Affirmative words are often, in their operation, negative of other objects than those affirmed * * *". It would have been a natural follow-up for the Alaska legislature, *had they so intended,* to add after "instrument" under the uttering and publishing grouping "or any other document(s) or type instrument(s) set forth above." The latter part of the section would then have read: "or (2) intentionally utters or publishes as true and genuine a false, altered, forged, counterfeited, falsely printed, or photographed record, writing, instrument, *or any of the document(s) or type instrument(s), set forth above,* or other matter, upon conviction, is punishable by imprisonment * * *".

Considering that a strict construction is required of penal statutes so that a defendant is favored, and that it is not uncommon to find penal statutes declared void for indefiniteness, these nondescript words should be scrupulously restrained. Couping these accepted concepts of the law against the backdrop in which these words appears is AS 11.25.010, as discussed above, it is submitted Counts II, V, XII and XV are fatally defective in that they charge a crime not covered within the language of the Section, and a conviction thereunder of the Petitioner threatens to deprive him of liberty and property without due process of law having been properly afforded him under the 14th Amendment of the U. S. Constitution.

CONCLUSION

For reasons set forth above, it is earnestly prayed that the Court grant the Writ of Certiorari petitioned for herein.

Respectfully submitted,

William Emmal

SANDERS, LIVELY & CAMAROT

By Henry J. Camarot

Henry J. Camarot

APPENDIX "A"

THE SUPREME COURT OF THE STATE OF ALASKA

KELLY CHAMBERS,
Appellant
v.
STATE OF ALASKA,
Appellee

File No. 416
OPINION
(No. 237 - Aug. 10, 1964)

Appeal from the Superior Court of the State of Alaska, Fourth Judicial District, Fairbanks, Walter E. Walsh, Judge.

Appearances: William B. Emmal, Fairbanks, and Henry J. Camarot, Springfield, Oregon, for Appellant. Herbert D. Soll, District Attorney, Fairbanks, Victor D. Carlson, Assistant District Attorney, Fairbanks, and Stephen S. DeLisio, Assistant District Attorney, Fairbanks, for Appellee.

Before: Nesbett, Chief Justice, Arend, Justice and Davis, Superior Court Judge.

NESBETT, Chief Justice.

Appellant was convicted on seven counts of a multiple count indictment charging him variously with forging deeds, uttering and publishing forged deeds and offering forged deeds for recording all in violation of statutes of Alaska.

Appellant's first point on appeal is that as to counts two, five, twelve and fifteen the indictment does not charge a crime because uttering and publishing a deed was not a violation of the law by the terms of the statute under which the state was prosecuting.

Section 65-6-1 ACLA 1949 [1] which was in force at the time of the acts complained of in the indictment provided in part:

> (1) That if any person shall, with intent to injure or defraud anyone, falsely make, alter, forge . . . (listing numerous documents) "deed" . . . (followed by another list of documents by name) . . . (2) or shall with such intent, knowingly utter or publish as true and genuine any such false, altered, forged, counterfeited, falsely printed, or photographed record, writing, instrument, or matter whatever, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than two nor more than twenty years. (numbers supplied)

Appellant's position is that although the first portion of the section made it a crime to forge a deed, the second portion did not make it a crime to utter and publish a deed. Appellant argues that the uttering and publishing provision applied only to a "record, writing, instrument or other matter."

The state argues that the second portion of the statute cannot be rationally construed except as intending, through the use of the words "record, writing, instrument, or matter," to include by implication the instruments named in the first portion of the statute.

Appellant argues that the court should consider this point even though no objection was raised at the trial for the reason that if uttering and publishing a forged deed was not a crime, then the error is serious enough to be

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[1] Now AS 11.25.010.

noticed as plain error under Criminal Rule 47(b).[2]

We are of the view that the counts of the indictment under consideration did state a crime. It seems plain enough that the wording "record, writing, instrument, or matter" found in the second section of the statute, refers to and includes the instruments named in the first portion of the statute, which includes a deed. Specifically, we hold that the word "instrument" as used in 65-6-1 ACLA 1949 includes deeds.[3]

Appellant's second point is that the indictment was insufficient in that it did not, in any of the appropriate counts, identify the property involved by definite description. Appellant argues that the effect of this insufficiency is that he could be reindicted for the same transactions and would be unable to plead double jeopardy.

The state points out in its brief that the particular counts of the indictment pertinent to this objection (counts 12, 13, 15 and 16) described the allegedly forged instruments as being deeds, gave the dates, the names of the grantors and grantees and the dates and deeds were presented to the recorder's office and argues that this information plus additional information which went into the record as a result

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2 Crim. R. 47. Harmless Error and Plain Error.

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

3 *State v. Phillips*, 157 Ind. 481, 62 N.E. 12 (1901), *Moore v. Diamond Dry Goods Co.*, 47 Ariz. 128, 54 P2d 553, 554 (1936).

of the trial proceedings so definitely identified the instruments as to preclude the possibility that appellant could ever be retried for the same offense.

We see no merit to appellant's argument even though it might be true that other deeds were passed between the same grantors and grantees on the same dates which were also offered for recording on identical dates. Each instrument was described in each count as being a deed to real property, the date of the instrument was given, the names of the grantors and grantees and the dates the deeds were presented to the recorder's office for recording were also stated. In addition the record reflects that as to the particular deeds upon which the state based its case, the originals were obtained from counsel for appellant during the trial and were introduced as defendant's exhibits 23 and 27. After introduction into evidence the property description contained in each deed became a part of the evidence submitted by the state in support of that particular count. These facts effectually eliminate the possibility that any particular deed upon which the state may have relied in prosecuting a given count might later be used as the subject of another indictment to which the plea of double jeopardy would not apply.

Appellant's next point is that the state relied upon identical acts to prove the crime of uttering or publishing a forged instrument and to prove the crime of procuring the recordation or offering forged instruments for recording, and that in reality only one offense was proved. According to appellant's theory the state must choose either to rely

on its convictions on counts two, twelve and fifteen, alleging uttering and publishing, or on counts four, thirteen and sixteen, alleging offering for recording, but that it cannot maintain the convictions and sentences on the various counts for both crimes.

Appellant relies on *Blockburger v. United States*[5] wherein it is stated:

> . . . where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

citing *Gavieres v. United States.*[6] In *Gavieres* it was held that the offenses of behaving in an indecent manner in a public place open to public view, punishable under municipal ordinance and the offense of insulting a public officer by deed or word in his presence, were not identical, so that a conviction of the first would not bar a prosecution for the other, even though the acts and words of the accused set forth in both charges were the same.

The protection intended by the rule is that of providing the defense of double jeopardy for the defendant. It was held in *Gavieres* that each offense required proof of a fact which the other did not, consequently a conviction of one offense would not bar a prosecution for the other.

Here the evidence showed that appellant had offered forged deeds for recording. Strictly speaking, standing alone, this amount of evidence went beyond that necessary

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[5] 284 U.S. 299, 304, 76 L.ed. 306, 309 (1932).
[6] 220 U.S. 338, 342, 55 L.ed. 489, 490 (1911).

to prove the offense of uttering or publishing as true a forged instrument. It would have been sufficient for the state to have shown that appellant had presented the instruments to a clerk in the recording office representing that they were true instruments, without a request that they be recorded. While this would have proved the crime of uttering and publishing, it would not have been sufficient to prove the crime of knowingly procuring or offering a forged instrument to be filed or recorded.[7] In the instant case the state not only proved the uttering or publishing by showing that the instruments were presented to the recording office with a representation that they were genuine, it proved the additional facts necessary to show that the instruments were offered to be recorded and that recordation was actually procured, therefore the rule of *Blockburger* is not applicable.

The remainder of the points mentioned in appellant's brief are either not included in his statement of points or are inadequately briefed, or both, and we shall, therefore, not attempt to express an opinion on them.

The judgment below is affirmed.

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[7] §65-7-24 ACLA (1949) stated:

Every person who knowingly procures or offers any false or forged instrument to be filed, registered, or recorded in any public office within the Territory, which instrument, if genuine, might be filed, registered or recorded under any law of this Territory or the United States, is guilty of a felony, and upon conviction, shall be punished by imprisonment in the penitentiary for not more than two years, or by a fine (of?) not more than two thousand dollars, or by both such fine and imprisonment.

Now AS 11.30.270.

APPENDIX "B"

CONSTITUTION OF THE UNITED STATES

Amendment XIV, Section 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

Amendment V

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, * *; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; * * * nor be deprived of life, liberty or property without due process of law; * * *."

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ALASKA STATUTES

Sec. 11.25.010. *Forgery of record or certificate and uttering forged instrument.* A person who, with intent to injure or defraud, (1) falsely makes, alters, forges, counterfeits, prints, or photographs a public record, certificate, return, or attestation of a clerk, notary public, or other public officer in relation to a matter in which the certificate, return or attestation may be received as legal evidence, or a note, certificate, or other evidence of debt issued by an officer of the state, or borough, town, or other municipal or public corporation, authorized to issue it, or a contract, charter, letters, patent, deed, lease, bill of sale, will, testament, bond, writing obligatory, undertaking, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, evidence of debt, or any acceptance of a bill of exchange, endorsement or assignment of a promissory note,

or a warrant, order, check, money, other property, a receipt for money or other property, an acquittance or discharge for money or other property, or a plat, draft, or survey of land; or; (2) intentionally utters or publishes as true and genuine a false, altered, forged, counterfeited, falsely printed, or photographed record, writing, instrument, or other matter upon conviction, is punishable by imprisonment in the penitentiary for not less than two years nor more than 20 years. (Sec. 65-6-1 ACLA 1949)

Sec. 11.30.270. *Filing, or offering for filing, false or forged instruments.* A person who knowingly procures or offers a false or forged instrument to be filed, registered, or recorded in a public office, which, if genuine, might be filed, registered or recorded under a law of this state or the federal government, is guilty of a felony, and upon conviction is punishable by imprisonment in the penitentiary for not more than two years, or by a fine of not more than $2,000 or by both. (Sec 65-7-24 ACLA 1949)

APPENDIX "C"

In the Superior Court of the State of Alaska
Fourth Judicial District, Fairbanks, Alaska

STATE OF ALASKA, Plaintiff v. KELLY CHAMBERS, LAZAR DWORKIN, AUBREY MORING, Defendants	INDICTMENT No. 62-107 Cr.

THE GRAND JURY CHARGES:

COUNT II

That on or about the 9th day of March, 1962 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Kelly Chambers did wilfully, unlawfully and feloniously with intent to defraud utter and publish as true and genuine a deed dated March 2, 1962 purporting to transfer interest in certain real property from Elizabeth Walker, to Thomas Radovitch to the Recorder's Office of the State of Alaska. At the time of uttering and publishing said deed the said Kelly Chambers knew said deed to be a forgery.

All of which is in violation of §65-6-1 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT III

That on or about the 2nd day of March, 1962 at or near Fairbanks, in the Fourth Judicial District, State of Alaska, Aubrey C. Moring, a notary public of the State of Alaska, did wilfully, unlawfully and feloniously affirm falsely that Elizabeth Walker had appeared before him and acknowl-

edged signing a deed dated March 2, 1962 transferring an interest in certain real property to Thomas Radovitch when in fact the said Elizabeth Walker did not appear before him and said deed was a forgery.

All of which is in violation of §65-7-1 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT IV

That on or about the 9th day of March, 1962 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Kelly Chambers did wilfully, unlawfully and feloniously offer and have recorded at the Recorder's Office for the State of Alaska a deed dated March 2, 1962 from Elizabeth Walker to Thomas Radovitch which, if genuine, would properly be recorded in said office, knowing at the time of offering said deed for recording that such had not been signed or executed by the said Elizabeth Walker and was a forged instrument.

All of which is in violation of §65-7-24 ACLA 1949, and against the peace and dignity of the State of Alaska.

COUNT V

That on or about December 26, 1961 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Lazar Dworkin and Kelly Chambers did wilfully, unlawfully and feloniously with intent to defraud, utter and publish as true and genuine to the Recorder's Office of the State of Alaska a deed dated December 26, 1961 from Albert Norlin to Kelly Chambers. At the time of uttering and publishing said deed, the said Lazar Dworkin and Kelly Chambers knew said deed to be a forgery.

All of which is in violation of §65-6-1 ACLA 1949 and against the peace and dignity of Alaska.

COUNT VI

That on or about December 26, 1961 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Lazar Dworkin, a notary public for the State of Alaska did wilfully, unlawfully and feloniously falsely affirm that Albert Norlin had appeared before him and acknowledged the signing of a deed dated December 26, 1961 transferring certain real property to Kelly Chambers when in fact Albert Norlin had not appeared before him and such deed was a forgery.

All of which is in violation of §65-7-1 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT VII

That on or about the 26th day of December, 1961 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Lazar Dworkin did wilfully, unlawfully and feloniously offer and have recorded at the Recorder's Office of the State of Alaska a deed dated December 26, 1961 from Albert Norlin to Kelly Chambers, which, if genuine, would properly be recorded at said office, knowing at the time of offering and having said deed recorded that such had not been signed or executed by Albert Norlin and was a forged instrument.

All of which is in violation of §65-7-24 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT XII

That on or about the 9th day of March, 1962 at or near

Fairbanks in the Fourth Judicial District, State of Alaska, Kelly Chambers did wilfully, unlawfully and feloniously with intent to defraud, utter and publish as true and genuine to the Recorder's Office of the State of Alaska, a deed dated March 2, 1962 purporting to transfer certain real property from Elizabeth M. Walker to the said Kelly Chambers, knowing at the time of uttering and publishing said instrument that it was a forgery.

All of which is in violation of §65-6-1 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT XIII

That on or about March 9th, 1962 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Kelly Chambers did wilfully, unlawfully and feloniously present for recording and have recorded at the Recorder's Office of the State of Alaska, the place where deeds are recorded, a deed dated March 2, 1962 purportedly transferring real property from Elizabeth M. Walker to the said Kelly Chambers. At the time of presenting such deed for recording, the said Kelly Chambers knew it to be a forgery.

All of which is in violation of §65-7-24 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT XIV

That on or about March 2, 1962 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Aubrey Moring did wilfully, unlawfully and feloniously while being a notary public for the State of Alaska, falsely affirm that Anna B. Radovitch and Thomas Radovitch had appeared before him and acknowledged signing a deed of trust and

mortgage dated March 2, 1962 between themselves and the Far North Baptist Association and Kelly Chambers as trustee, when in fact Anna and Thomas Radovitch had not appeared before him and executed said document and such document was a forgery.

All of which is in violation of §65-7-1 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT XV

That on or about March 9th, 1962 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Kelly Chambers did wilfully, unlawfully and feloniously, with intent to defraud utter and publish as true and genuine to the Recorder's Office of the State of Alaska a Deed of Trust and Mortgage dated March 2, 1962, and between Thomas and Anna Radovitch and the Far North Baptist Association and Kelly Chambers as trustee. At the time of uttering and publishing said trust deed and mortgage, the said Kelly Chambers knew the same to be a forgery.

All of which is in violation of §65-6-1 ACLA 1949 and against the peace and dignity of the State of Alaska.

COUNT XVI

That on or about March 9th, 1962 at or near Fairbanks in the Fourth Judicial District, State of Alaska, Kelly Chambers did wilfully, unlawfully and feloniously offer and have recorded at the Recorder's Office of the State of Alaska, a place where valid documents of title are properly recorded, a trust deed and mortgage dated March 2, 1962 and between Thomas and Anna Radovitch and the Far North Baptist Association and Kelly Chambers as trustee.

At the time of having said document recorded, the said Kelly Chambers knew it to be forged.

All of which is in violation of §65-7-24 ACLA 1949 and against the peace and dignity of the State of Alaska.

A TRUE BILL

Foreman

District Attorney

Names of witnesses examined before the Grand Jury:

1. Elbert Norlin
2. Elizabeth Walker
3. Herbert Grawert
4. Thomas Radovitch
5. Lewis Gibson